PUBLIC PROSECUTOR

v.

ALI ABANG & ORS.

HIGH COURT BORNEO, KUCHING
RICHARD MALANJUM JC
[CRIMINAL APPEAL NO. KG. 5 OF 1992]
4 MAY 1992

CRIMINAL PROCEDURE: *Appeal by Public Prosecutor against acquittal - Accused/ respondents charged under s. 379 of the Penal Code (theft) - Evidence may be re-examined on appeal - Consideration of element of "dishonest intention" - Question of fact - Subjective view.*

The respondents had visited the Marine Police Base compound at Bintawa, Kuching, Sarawak with the purpose of collecting scrap iron pieces in order to sell them. The respondents asked an officer for permission to remove the iron pieces. Sometime later they were asked to meet with another officer. The respondents were eventually detained at the office and subsequently charged under s. 379 of the Penal Code.

The Public Prosecutor appealed against the acquittal by the learned Magistrate on 5 grounds. However the learned Judicial Commissioner considered only one ground to be materially relevant and required further deliberation. That relevant ground was as follows:

> that the learned trial Magistrate misdirected himself on the ingredient of "dishonest intention".

Held:

[1] The Court can re-examine all the evidence to determine if the findings made by the Court of first instance are correct. On the evidence, the undisputed facts show that the respondents had asked for consent to remove the iron pieces and had not attempted to abscond when detained at the office. This is consistent with their state of mind being free from any dishonest intention as an absence of consent is an important ingredient in proving dishonest intention.

[2] Whether or not a person acts dishonestly relates to the person's state of mind and is a question of fact which must be considered subjectively.

[Appeal dismissed. The order of acquittal of the learned Magistrate affirmed.]

Cases referred to:
PP v. Ma'arif [1969] 2 MLJ 65 ***(cit)***
PP v. Wan Razali Kassim [1970] 2 MLJ 79 ***(cit)***
Boggeln v. Williams [1978] 2 All ER 1061 ***(cit)***

Legislation referred to:
Penal Code, s. 379

For the appellant - S. Selvanathan, DPP
For the respondents - Novine Ayur; M/s. Mutang Tagal & Co.

JUDGMENT

Richard Malanjum JC:

This is an appeal by the Public Prosecutor against the acquittal of the respondents on a charge under s. 379 of the Penal Code by the learned trial Magistrate on the 12 October 1991. The undisputed facts as gathered from the evidence adduced in the course of the trial is that the four respondents with another person by the name of Razak went to the Marine

Police Base compound at Bintawa, Kuching Sarawak on 1 September 1987 at about 1.45 p.m. The purpose of going there was to collect scrap iron pieces with a view to sell. According to the respondents they were informed of the existence of the scrap iron pieces by Razak and was also told that the iron pieces can be taken. It is not in dispute the existence of Razak and that he lived in the Marine Police Base compound.

It is also in evidence that on arrival at the Marine Police Base the respondents asked for permission from PW2 (P/Sgt. Muslim bin Raie). According to the respondents in particular respondent No. 1, PW2 did not reply but proceeded to the office. PW2 disputed this and said that he did inform the respondents not to take the scrap iron pieces. Unfortunately, the learned trial Magistrate did not make it clear in his judgment which of the two versions is acceptable to him. However, reading from his judgment it can be inferred that the learned trial Magistrate had concluded that even if PW2 had replied he could not have been heard due to his soft voice.

It is also not in dispute that PW2 later on came back from the office of PW1 and asked the respondents to follow him to PW1's office. All the 4 respondents followed. The respondents were subsequently detained at the office whilst PW1 went to lodge a police report at the Central Police Station Kuching.

The Public Prosecutor now appeals against the order of acquittal on 5 grounds namely:

(i) that the learned trial Magistrate misdirected himself on the ingredient of "dishonest intention";

(ii) that the learned trial Magistrate erred in law in holding that the prosecution must prove the area to be Marine Base by producing gazette to that effect;

(iii) that the learned trial Magistrate erred in law and in fact in requiring proof that the metal pieces belonged to the government when the charge speaks of possession of PW1 (Insp. Mustafa bin Husin);

(iv) that the learned trial Magistrate erred in law and in fact in holding that the respondents did not actually remove the property from the possession of PW1 (Insp. Mustafa); and

(v) that the order of acquittal was most unsatisfactory and could not be supported having regard to the totality of the evidence adduced.

I have considered the grounds of appeal by the Public Prosecutor and the submissions made during the hearing of this appeal. I have also considered the submissions of the learned Counsel for the the respondents.

No doubt it is settled law that "an appeal is merely a continuation of a trial, and throws open all the evidence to re-examination in order to determine whether or not the various findings of the Court are correct". [*see: PP v. Ma'arif [1969] 2 MLJ 65*]. It has also been held that the appellate Court should not reserve the decision of the lower Court on the ground of it being against the weight of the evidence. The appellate Court should only do so if the decision was grossly against the weight of the evidence. (see: *PP v. Ma'arif* [1969] 2 MLJ 65; and *PP v. Wan Razali Kassim* [1970] 2 MLJ 79].

Having also perused the judgment of the learned trial Magistrate and the notes of proceedings as contained in the appeal record it is my judgment that the respondents have been properly acquitted. Of the 5 grounds of appeal submitted I find that only the issue of 'dishonest intention' requires further consideration. The other 4 grounds have either been considered by the learned trial Magistrate as proven or they are not materially relevent for the purpose of coming to a decision in this appeal.

It is an important ingredient that a person can only be convicted of theft if he has the dishonest intention of taking any moveable property out of the possession of any person without that person's consent. Of course the other ingredient is that he moves the property in order to such taking.

On examination of the notes of proceedings there is lacking clear evidence adduced that the respondents had the dishonest intention when they went to the Marine Base to collect the scrap iron pieces. In fact the evidence adduced shows otherwise. Firstly, (1) it is not in dispute that the respondents asked for permission and according to them there was no response from PW2. Instead PW2 went to the office of PW1. If the respondents had the intention to steal the scrap iron pieces they would have tried to escape from the sight of PW2 in the first place. But this is not the case here. Secondly, (2) it is not in dispute that when PW2 went to PW1's office the respondents did not run away. This is more likely to support their belief at that time that PW2 was not objecting. Indeed the 1st respondent was of the view that when they were asked to go to the office he thought it was to get permission from the officer (PW1). The conduct of the respondents therefore show their state of mind at that time and I can only conclude that there was no dishonesty on their part at the material time. Whether or not a person acted dishonestly is a question of fact and relates to a person's state of mind.

> That is a question which relates to the defendant's state of mind and must, in my judgment, be answered subjectively: "did the defendant have a dishonest mind or not?" per Lloyd J in *Boggeln v. Williams* [1978] 2 All ER 1061.

In view of my conclusion on the ingredient of dishonest on the part of the respondents I do not find it necessary to go into the other issues raised by the learned DPP as on this issue alone this appeal can be disposed of.

I hereby dismiss the appeal and affirm the order of acquittal by the learned trial Magistrate.

Also found at [1992] 3 CLJ 1731